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MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1976

**TRUCK DRIVERS, OIL DRIVERS, FILLING STATION AND
PLATFORM WORKERS UNION LOCAL NO. 705, AFFILIATED
WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
PETITIONER**

v.

NATIONAL LABOR RELATIONS BOARD

AARON KESNER, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

**ON PETITIONS FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE SEVENTH CIRCUIT**

**BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD
IN OPPOSITION**

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In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-228

TRUCK DRIVERS, OIL DRIVERS, FILLING STATION AND
PLATFORM WORKERS UNION LOCAL NO. 705, AFFILIATED
WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
CHAUFFEURS WAREHOUSEMEN AND HELPERS OF AMERICA,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

No. 76-5305

AARON KESNER, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITIONS FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD
IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Union Pet.
App. A1-A11)¹ is reported at 532 F. 2d 1169. The
Board's decision and order (Union Pet. App. B1-B36)
are reported at 209 NLRB 292.

¹"Union Pet. App." refers to the appendices to the petition in No.
76-228.

JURISDICTION

The judgment of the court of appeals was entered on April 8, 1976. A petition for rehearing *en banc* was denied on May 18, 1976. The petitions for a writ of certiorari were filed on August 12 and 16, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Whether a union's breach of its duty of fair representation in its processing of an employee's grievance may constitute an unfair labor practice in violation of Section 8(b)(1)(A) of the National Labor Relations Act (the "Act").

2. Whether the court of appeals and the National Labor Relations Board (the "Board") correctly found that in the circumstances of this case the Union violated its duty of fair representation and Section 8(b)(1)(A) of the Act by undertaking to present an employee's grievance to an arbitration panel pursuant to established grievance procedures and by then urging the panel to reject the grievance.

3. Whether the Board abused its discretion in declining to impose affirmative sanctions against the Union.

STATUTES INVOLVED

The relevant portions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), provide:

Section 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of

collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities * * *.

Section 8(b). It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7 * * *.

STATEMENT

The relevant facts are set forth in detail in the opinions of the court of appeals (Union Pet. App. A), the Board and the Board's Administrative Law Judge (Union Pet. App. B).

In January, 1972, petitioner Kesner filed a grievance against Foster and Kleiser Company (the "Company"). Kesner had worked briefly for the Company as a truck driver in 1970 and contended in his grievance that the Company had violated his contractual seniority rights by recalling another driver and hiring new drivers without first recalling him.

Under the procedures established by the collective bargaining agreement between the Company and the Union, grievances of the sort filed by Kesner are to be processed in two stages. First, within five days of the filing of a grievance by an employee the Union and the Company are obligated to meet in an effort to settle the matter informally. If the Union and the Company are able to agree on a settlement of the matter, the result is "final and binding." Second, if the Union and the Company are unable to agree—*i.e.*, if the matter is "deadlocked"—the grievance is referred to a twelve-member Joint Grievance Committee, whose disposition of the matter is again "final and binding." If the Com-

mittee is deadlocked, then "either party shall be entitled to all lawful economic recourse to support its position in the matter." (Union Pet. 3-4, n. 2.)

Upon the filing of Kesner's grievance, the Union arranged a meeting with the Company. At that meeting, both the Company's representative and the Union representative, Donald Heim, took the position that Kesner had been hired on a temporary basis and therefore could not have acquired any seniority. Nevertheless Heim declared a deadlock and the matter was referred to the second and final level of the grievance procedure, the Joint Grievance Committee.

At the hearing before the Committee, the Company representative and Heim again contended that Kesner's grievance was without merit. The Committee, however, remanded the matter to the first stage of the procedure with instructions to the parties to check Kesner's employment and payroll records. Thereafter, two additional first-stage meetings were held. Although Kesner's employment records indicated that he had in fact been hired on a temporary basis, the Union again referred the matter to the Joint Committee.

At the second hearing before the Committee, Heim again argued that Kesner's grievance was without merit and urged the Committee to reject the grievance. Heim argued that to permit temporary employees to accrue seniority would be contrary to the collective bargaining agreement, and would upset labor relations in the area.² The Committee then voted to disallow Kesner's grievance.

²The collective bargaining agreement does not in terms distinguish between permanent and temporary employees for purposes of determining seniority. However, the Union argued, and the Board ultimately agreed, that the seniority provisions of the agreement were not intended to apply to temporary employees (Union Pet. 3, n. 1).

Thereafter, Kesner filed unfair labor practice charges with the Board against the Union. The Board concluded that the Union had breached its duty of fair representation to Kesner and thereby violated Section 8(b)(1)(A) by undertaking to present Kesner's grievance to the Joint Grievance Committee and then urging the Committee to reject the grievance. The Board agreed with its Administrative Law Judge that the Union's position on Kesner's grievance was taken in good faith. The Board concluded, however, that, once the Union decided to present the grievance to the Joint Grievance Committee, the Union was obligated to act as Kesner's representative, not his adversary. Accordingly, the Board ordered the Union to cease and desist from restraining employees in the future exercise of their Section 7 rights. However, the Board also found that Kesner's grievance was without merit in fact and therefore declined to impose any further affirmative sanctions upon the Union.³

The court of appeals upheld the Board's decision and denied petitions for review filed by the Union and Kesner. While recognizing that "a union may in good faith refuse to process a member's grievance altogether," the court held that the Union violated its duty of fair representation when, having undertaken to represent an employee in the grievance process, it acted as his adversary rather than his representative (Union Pet. App. A9-A10). The court also held that the Board's finding that Kesner's grievance was without merit was supported by substantial

³The Board also found that the Union had violated Section 8(b)(1)(A) in connection with several threats made by Union representatives to Kesner and his brother in the course of the grievance proceedings (Union Pet. App. B1-B2). The Union has not sought review of those findings.

evidence and that the Board therefore had not abused its discretion in declining to impose affirmative sanctions against the Union (Union Pet. App. A10-A11).

ARGUMENT

1. Petitioner Union argues as a threshold matter that a union's breach of its duty of fair representation does not constitute an unfair labor practice under Section 8(b)(1)(A) of the Act "where the union's conduct was unrelated to an employee's union membership and activities or his utilization of the National Labor Relations Board processes" (Union Pet. 2), and that the Board was therefore without jurisdiction over this matter. The court of appeals correctly rejected that contention.⁴

As this Court stated in *Vaca v. Sipes*, 386 U.S. 171, 177, it has long been recognized that a union has a statutory duty to represent fairly all employees in a bargaining unit "both in its collective bargaining * * * and in its enforcement of the resulting collective bargaining agreement * * *." In *Miranda Fuel Co.*, 140 N.L.R.B. 181, enforcement denied, 326 F. 2d 172 (C.A. 2), the Board first ruled that a union's breach of its duty of fair representation also constitutes an unfair labor

⁴Although the Union had not made this contention to the Board during the Board's proceedings, the court of appeals nevertheless chose to consider it. It is submitted that the Union's failure to afford the Board an opportunity to pass upon its "jurisdictional" contention after the Administrative Law Judge had clearly indicated his view that the Board has jurisdiction over the matter should have precluded the Union from making the contention for the first time on appeal, and is a further reason for denying certiorari. See *Marshall Field & Co. v. National Labor Relations Board*, 318 U.S. 253; *National Labor Relations Board v. Good Foods Mfg. & Processing Corp.*, 492 F. 2d 1302 (C.A. 7); *Red Cross Drug Co. v. National Labor Relations Board*, 419 F. 2d 1245 (C.A. 7).

practice under Section 8 of the Act, whether or not the union conduct related directly to the employee's union membership or activities. The Board's *Miranda Fuel* ruling has been expressly adopted by the Fifth, Seventh, Ninth and District of Columbia Circuits,⁵ and has been cited with apparent approval by the First and Third Circuits.⁶ Moreover, this Court clearly assumed the validity of the *Miranda Fuel* doctrine in *Vaca v. Sipes*, *supra*, when it held that a union member's claim of breach of the duty of fair representation in connection with the union's handling of his grievance could be considered judicially even though the conduct might also have been an unfair labor practice within the Board's jurisdiction under *Miranda Fuel*. See also *Emporium Capwell Co. v. Western Addition Community Org.*, 420 U.S. 50, 64. There is therefore no basis for the Union's claim that the Board is without jurisdiction over unfair representation cases and no conflict in the circuits warranting this Court's intervention.⁷

⁵*National Labor Relations Board v. International Longshoremen's Ass'n, Local 1581*, 489 F. 2d 635 (C.A. 5), certiorari denied, 419 U.S. 1040; *National Labor Relations Board v. International Longshoremen's Ass'n, Local 1367*, 368 F. 2d 1010 (C.A. 5), certiorari denied, 389 U.S. 837; *Local Union No. 12, Rubber Workers v. National Labor Relations Board*, 368 F. 2d 12, 17 (C.A. 5), certiorari denied, 389 U.S. 837; *Barton Brands, Ltd. v. National Labor Relations Board*, 529 F. 2d 793 (C.A. 7); *Kling v. National Labor Relations Board*, 503 F. 2d 1044, 1046 (C.A. 9); *Truck Drivers and Helpers, Local Union 568, Teamsters v. National Labor Relations Board*, 379 F. 2d 137, 141-142 (C.A. D.C.).

⁶*De Arroyo v. Sindicato De Trabajadores Packinghouse*, 425 F. 2d 281, 287 (C.A. 1), certiorari denied, 400 U.S. 877; *Bleier v. National Labor Relations Board*, 457 F. 2d 871, 872-873 (C.A. 3).

⁷Although the Second Circuit denied enforcement to the Board's order in *Miranda Fuel*, 326 F. 2d 172, that court has never reconsidered the issue. See *National Labor Relations Board v. Local 485, Int. U. of Electrical, R. & M. Wkrs.*, 454 F. 2d 17, 21,

In any event, the Union's arguments concerning the Board's alleged lack of jurisdiction are inapposite to the circumstances of this case. Without ruling on the issue directly, the court of appeals noted, "we would have difficulty in saying that a union's failure to act vigorously as an advocate in presenting a grievant's position when it had undertaken to do so would be unrelated to an employee's union membership and activities * * * " (Union Pet. App. A8). See *Vaca v. Sipes, supra*, 386 U.S. at 190-193; *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 563-564; *Humphrey v. Moore*, 375 U.S. 335, 342.

2. The Union contends that it did not in any event breach its duty of fair representation or commit an unfair labor practice, because the position of its representative on the merits of Kesner's grievance was taken in good faith and served the interests of its other members and because the grievance was ultimately determined to be without merit. The Board and the court of appeals properly rejected those contentions.

The Union's conduct in the handling of Kesner's grievance directly impaired the integrity of the grievance procedure and thereby violated the Section 7 rights not only of Kesner but also of all the other employees in the bargaining unit. In *Vaca v. Sipes, supra*, 386 U.S. at 191, this Court had occasion to discuss at some length the role of grievance procedures in the framework of the federal labor laws.

n. 6 (C.A. 2). Moreover, only one member of the panel concluded that the Board lacked jurisdiction over the matter under Section 8(b)(1)(A). Chief Judge Lumbard and Judge Friendly saw no reason to reach the question of jurisdiction under Section 8(b)(1)(A), and Judge Friendly, dissenting, would have sustained the Board's Section 8(b)(2) finding.

In providing for a grievance and arbitration procedure which gives the union discretion to supervise the grievance machinery and to invoke arbitration, the employer and the union contemplate that each will endeavor in good faith to settle grievances short of arbitration. Through this settlement process, frivolous grievances are ended prior to the most costly and time-consuming step in the grievance procedures. Moreover, both sides are assured that similar complaints will be treated consistently, and major problem areas in the interpretation of the collective bargaining contract can be isolated and perhaps resolved. And finally, the settlement process furthers the interest of the union as statutory agent and as coauthor of the bargaining agreement in representing the employees in the enforcement of that agreement. See Cox, *Rights Under a Labor Agreement*, 69 Harv. L. Rev. 601 (1956).

The Court further noted that a union's exclusive authority to compel or decline to compel arbitration of grievances was necessary to prevent a significantly greater number of grievances from burdening the arbitration machinery and preventing it from functioning successfully. 386 U.S. at 191-192. The Court has also stated that a union's control over the grievance procedure imposes upon the union "a responsibility equal in scope to its authority" (*Hines v. Anchor Motor Freight, Inc., supra*, 424 U.S. at 564), and that the union is "subject always to complete good faith and honesty of purpose in the exercise of its discretion" (*Humphrey v. Moore, supra*, 375 U.S. at 349).

Under the foregoing principles, if the Union believed in good faith that Kesner's grievance was without merit, its responsibility was to decline to compel the arbitration of the grievance. By twice referring the grievance to the Joint Grievance Committee while at the same time

urging the Committee to reject the grievance, the Union made the grievance procedure a sham, and impaired its credibility, not only from the viewpoint of the employer, but also from the viewpoint of all employees in the unit. Under the Act those employees are entitled to expect that when their bargaining agent invokes the formal arbitration provisions of their agreement they will not, in the words of the court of appeals, be faced with "two opponents, one of whom is supposedly [their] 'own people' " (Union Pet. App. A9).

Contrary to the Union's contentions, the Board's decision here is fully consistent with this Court's decisions in *Vaca v. Sipes*, *Humphrey v. Moore*, and *Hines v. Anchor Motor Freight, Inc.*, *supra*.

In *Vaca v. Sipes*, this Court held that a union did not breach its duty of fair representation when it refused to compel arbitration of a grievance based on its good faith judgment as to the merits of the grievance. Here, conversely, the Union compelled arbitration *notwithstanding* its judgment that the grievance was without merit, and then vitiated the arbitration process by joining the employer in opposing the grievant.

In *Humphrey v. Moore*, the union submitted to arbitration a seniority dispute between two groups of employees within the union. Although the union supported the position of one of the groups, this Court held that it had not breached its duty of fair representation when the other group was fully aware of the conflict between the two groups and was adequately represented at the arbitration hearing by three union stewards supplied at union expense. Here Kesner had no representative at his hearings, only adversaries.

In *Hines v. Anchor Motor Freight*, *supra*, this Court held that an employee's suit against an employer for breach of the collective bargaining agreement was im-

properly dismissed when an accompanying complaint against the union for having breached its duty to represent the employee fairly in the arbitration proceeding was still unresolved. Far from supporting petitioner Union's position, *Hines* serves to reemphasize a union's special responsibilities in representing employees in grievance proceedings.

Finally, the Union's contention that the Board's decision constitutes a "Catch 22" (Union Pet. 12) is unfounded. The decision merely confirms that, when a union in good faith concludes that a grievance is without merit, it may not abuse the grievance procedure by compelling arbitration and then opposing the grievant. As this Court has recognized, a union's discretion to refuse to compel arbitration of grievances is broad, and the burden on employees challenging that discretion will remain substantial. *Hines v. Anchor Motor Freight*, *supra*, 424 U.S. at 570. But when a union concludes that a grievance should proceed to arbitration, the grievance procedure can properly function only if the union ensures that the grievant's interests are vigorously represented in the arbitration proceeding.

3. Petitioner Kesner's challenge, in No. 76-5305, to the Board's failure to impose affirmative sanctions against the Union beyond the issuance of a cease and desist order is without merit. As the court of appeals noted, the Board's discretion in the selection of remedies is broad and will not be overturned in the absence of a clear abuse of discretion (Union Pet. App. A10). Here the Board declined to order affirmative relief because it found that Kesner was in fact hired as a temporary employee and that his grievance was therefore without merit. As the court of appeals held, that finding is amply supported in the record (Union Pet. App. A10-A11, B3, B27).

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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